INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	8
Conclusion	16

CITATIONS

Cases:

Casey v. *United States*, 276 U. S. 413 — 8

Glasser v. *United States*, 315 U. S. 60 — 13

Hargrove v. *United States*, 25 F. 2d 258 —

Herron v. *Southern Pacific Co.*, 283 U. S. 91 — 14

Kettenbach v. *United States*, 202 Fed. 377, certiorari denied, 229 U. S. 613 — 15

Shurin v. *United States*, certiorari pending, No. 521, this Term — 11

Smith v. *United States*, 17 F. 2d 723, certiorari denied, 274 U. S. 762 — 15

Sorrells v. *United States*, 287 U. S. 435 — 8, 9

United States v. *Becker*, 62 F. 2d 1007 — 9

United States v. *Breen*, 96 F. 2d 782, certiorari denied, 304 U. S. 585 — 14

United States v. *Gross*, 103 F. 2d 11 — 14

Weathers v. *United States*, 126 F. 2d 118, certiorari denied, 316 U. S. 681 — 9

775228—48——1

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 532

IRWIN KOTT, ISRAEL NEEDLEMAN, AND HARRY WEINER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 1319–1326) is reported at 163 F. 2d 984. The opinion of the district court denying petitioners' motions for judgments of acquittal appears at pages 770–786 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered October 23, 1947 (R. 1326). A petition for rehearing was denied November 19, 1947 (R. 1338). On December 13, Mr. Justice Black

extended petitioners' time to file a petition for a writ of certiorari to January 18, 1948 (R. 1338), and the petition was filed on January 16, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioners were entrapped into committing the offense charged.

2. Whether it was proper, to meet the defense of entrapment, to permit the Government to introduce evidence of statements by a person purportedly representing petitioners' firm.

3. Whether petitioners' motions for change of venue were properly denied.

4. Whether it was proper for the trial judge to conduct a hearing outside the presence of the jury to determine the permissible scope of the cross-examination of the Government's chief witness.

5. Whether a subpoena to examine all the records of the business of the Government's chief witness, not relating to the offense charged, was properly quashed.

6. Whether the conduct of the trial judge was proper.

STATEMENT

A four count indictment, charging substantive violations of the Emergency Price Control Act,

and conspiracy to violate the Act in the sale of liquor at over-ceiling prices, was returned against petitioners and one Semel in the United States District Court for the Western District of Louisiana (R. 8–21). Petitioners were convicted on count 3 charging an unlawful sale, and on count 4, the conspiracy count (R. 10–21, 1268). On Count 4, petitioner Kott was sentenced to imprisonment for a year and a day, and petitioners Needleman and Weiner to imprisonment for 6 months and to pay a fine of $10,000. Imposition of sentence was suspended as to all the petitioners on count 3, and petitioners were placed on probation for a period of five years. (R. 1284–1290.) On appeal the judgments were affirmed (R. 1326).

The evidence for the Government may be summarized as follows:

In the spring of 1945, a man named Hillman asked one Comell John whether he would be interested in purchasing Meadville whiskey at $65 per case, about $23.50 above the ceiling price (R. 110–111, 114–115).[1] John said that he was not interested because the price was too high (R. 115). However, Hillman left with John a card bearing the name and telephone number of Distillers Factors Corporation, and told him to

[1] John admittedly engaged in the liquor business in Mississippi (R. 108, 310), although the liquor traffic is officially outlawed in that state (see R. 377). He bought liquor through the John's Beverage Company of Tallulah, Louisiana, a firm in his wife's name (R. 108, 341; see R. 233, 236, 238–239).

get in touch with that firm should he become interested later (R. 115). John reported this conversation to Pace, an investigator of the Alcohol Tax Unit (R. 116).

In July 1945, John called the office of the Distillers Factors Corporation and asked for Mr. Hillman. A man, who identified himself as Kott, said that Hillman was not there but that he would do just as well. John asked about the whiskey he had discussed with Hillman. Kott replied that he could not give any prices over the telephone, but suggested that John come to New York. (R. 117–119.)

John, a friend of his named Patterson, and Pace, the Alcohol Tax Unit investigator, arrived in New York on August 6, 1945 (R. 119, 601, 623). After their arrival, John was confined to bed for a few days because of a knee injury (R. 119–120, 602, 654). He called Distillers Factors and told Kott that he could not come down to the office because of his injury. Kott said that, while it was not their usual custom to do business in a hotel room, under the circumstances he would visit John. (R. 120–121.)

Kott, Needleman and Weiner came to John's hotel room that evening (R. 121, 602). Patterson was present at the meeting (R. 121, 124, 602). They discussed the sale of Meadville whiskey and quoted John a price of from $63.50 to $65.00 per case. John said he was not interested. No

agreement was reached that evening. (R. 123, 603.)

The next morning, while Pace was talking to John and Patterson, Kott arrived unexpectedly (R. 125, 603, 657). John introduced Pace as "Mr. Hennigan," his sales manager (R. 125, 604, 657). Kott said that they had decided to let John have the whiskey at $60 per case—$37.97, the ceiling price, to be paid by letter of credit to United Distillers; $2.00 brokerage fee by check to Distillers Factors; and the balance in cash of denominations of $100 or less (R. 125–126, 604, 657). Kott said that he had to leave town and that Needleman and Weiner would complete the deal (R. 126, 657).

John arranged to get a letter of credit, payable to Capitol National Bank at Hartford (R. 129, 396–397), and had his wife wire him $11,000, which he changed to bills of small denominations (R. 129–130, 663).

A few days later, Pace and John went to the office of Distillers Factors, and saw Needleman and Weiner there (R. 126–127, 658). John inquired about Hillman, and Needleman said that Hillman was no longer with them, having failed to turn over money he had collected (R. 127–128). Weiner called the distillery to make arrangements for the delivery of the whiskey, but since John's letter of credit had not yet arrived, no definite plans were made (R. 130–132).

On the following Monday or Tuesday, John and Weiner, representing Distillers Factors, signed a letter by which John agreed to pay Distillers Factors a brokerage fee of $2.00, to be considered as part of the 15 percent mark-up allowed wholesalers by O. P. A. (Gov. Ex. G–2, R. 135, 139–140). John also signed a statement to the effect that no other consideration had been promised or paid to Distillers Factors (Gov. Ex. G–5, R. 137–138, 184–186).

On August 14, John, Pace, and Needleman drove to Connecticut to the distillery of United Distillers (R. 141–142, 664), a firm owned by the co-defendant Semel, who was acquitted (R. 593, 1268). It was discovered that the whiskey could not be shipped that day, and John stated that he would not pay the money until the whiskey was delivered (R. 144–149, 671–672).

John and Pace returned to New Orleans (R. 149). Later in the month, John wired Distillers Factors that he was still interested in the whiskey (R. 149–150). In response to the wire, Needleman called and said that they would load the whiskey but that there would have to be changes in the letter of credit (R. 150). Arrangements were made for such changes (R. 150, 408–412). Needleman also said that Kott would come to Mississippi to collect the cash payment (R. 150).

Kott arrived at Jackson, Mississippi, on September 7 (R. 150). John told him that he would

have to go to Tallulah, Louisiana, the office of John's Beverage Company, to get the check representing the brokerage fee, and that the cash would be paid there (R. 151). Kott said that he would not let the whiskey come through until he received the money, and John said that he would not pay the money until he had evidence that the bill of lading had been surrendered to the bank (R. 154).

John arranged with the Alcohol Tax Unit investigators to take down the serial numbers of the money he intended to give Kott, and then he deposited the money in the safe of the John's Beverage Company (R. 164–165, 630–632, 673).

The next day, John and Kott drove to the office of the John's Beverage Company in Louisiana (R. 165). John gave Kott the money but refused to let him leave the office until they received word that the bill of lading had been surrendered (R. 166–167). About noon, word was received that the bill of lading had been surrendered against the letter of credit (R. 170).

Kott and John then left the office. John gave the Alcohol Tax Unit investigators, who were waiting, a prearranged signal indicating that the transaction had been completed. (R. 171–172, 634, 680.) On the way from Tallulah, Louisiana, to Vicksburg, the Alcohol Tax Unit investigators stopped the car and arrested Kott (R. 172, 635). They found on his person the money paid to him

775228—48——2

by John, the serial numbers of which corresponded with the numbers they had previously taken down (R. 636).

ARGUMENT

1. As is usual in situations where government agents observe the unfolding of an offense in an undercover capacity, petitioners strongly urge (Pet. 11–12, 14, 17–24) that they were entrapped into committing the offense charged. The facts, as set forth in the Statement, *supra*, are a sufficient answer to this contention. This is not a case in which "the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells* v. *United States*, 287 U. S. 435, 442. In response to a telephone call asking about the price of whiskey, petitioners suggested that John come to New York. In response to his call from New York, they came to his hotel room and discussed the sale of whiskey. When he asserted that their price was too high, they came down in their price. These were no innocent persons instigated to illegal action; these were illegal operators who "acceded without hesitation and as a matter of course" to an offer to purchase. *Casey* v. *United States*, 276 U. S. 413, 419. The issue of entrapment was submitted to the jury on full and proper instructions (R. 1236–1239, 1257), and on ample

evidence, the jury resolved that issue against petitioners.

2. In this connection, it is immaterial whether Hillman was or was not an agent of petitioners[2] or a co-conspirator with John to render admissible the testimony in regard to Hillman's offer to John and John's statement to Pace about that offer (see Pet. 13, 19–20, 30–32). Faced with the defense of entrapment, the Government had the right to show reasonable grounds for suspicion that the accused were predisposed to commit the offense. *Sorrells* v. *United States,* 287 U. S. 435, 451. The challenged evidence was directly relevant to that issue and was expressly admitted for that purpose by the trial judge (R. 111–112, 650). Its admission was therefore clearly proper. See *Weathers* v. *United States,* 126 F. 2d 118 (C. C. A. 5), certiorari denied, 316 U. S. 681; *United States* v. *Becker,* 62 F. 2d 1007, 1008–1009 (C. C. A. 2).

3. Petitioners contend that it was an abuse of discretion to deny their motions for a change of venue, on the ground that, in their affidavits in support of the motions, they had made a sufficient showing of the necessity for such change

[2] Hillman's agency for petitioners at the time he made the offer to John was in fact established, not only by Hillman's own statements to that effect, but by Kott's willingness to talk with John at the time of his first telephone call asking for Hillman (R. 117–118), and by the admissions of Weiner and Needleman that Hillman had been their representative (R. 127–128).

(Pet. 14–15, 25–30), and on the further ground that they had been lured into committing an overt act in the State of Louisiana where the prosecution was brought (Pet. 12–14, 24–25).

In their motions for change of venue, petitioners asserted that they were residents of New York, that the major negotiations had taken place in New York, and that they desired to call witnesses who would testify voluntarily in New York, but who would not come to Louisiana. Among the witnesses whom they stated they intended to call were office personnel of Distillers Factors, persons involved in other transactions in which John had given information to the government investigators, and character witnesses. (R. 30–39.) We think it is clear that the trial judge committed no abuse of discretion in denying the motion on such showing. Petitioners were not impecunious defendants who could not afford to pay the expenses of such office personnel as they desired to call, and they manifestly had control of such witnesses. The other witnesses whom they stated they wished to call to testify to alleged entrapments by John upon other occasions were clearly unnecessary, since their testimony would have been irrelevant. As to character witnesses, the trial judge stated he normally limited such witnesses to two (R. 65).

In actual effect, petitioners benefited by having their trial in Louisiana, since a major portion of their defense consisted of attacks on the credibility of John, the Government's chief witness,

and the witnesses whom petitioners called on this issue all resided in the region where the trial was had (R. 907, 927–928, 941–942, 945–949). They also examined the books of the John's Beverage Company in Louisiana and had a witness testify to the result of that examination (R. 957–982). These witnesses obviously had a more direct relationship to the issues in the case, than those whom petitioners proposed to call. Petitioners are thus in no position to claim prejudice by the denial of their motions for a change of venue, and thus are in no position to claim reversible error. See *Shurin* v. *United States,* decided November 10, 1947 (C. C. A. 4), certiorari pending, No. 521 this Term.

As to their contention that they were lured into committing the offense in Louisiana, it should be noted at the outset that petitioners were not lured into committing an offense in the south. The illegal sale to John was not completed in New York or Connecticut because petitioners were not in a position to make delivery at the time of John's visit. Kott made the visit south for the specific purpose of completing the sale which petitioners had not previously been able to complete. It may be that Kott expected to complete the transaction in Mississippi rather than Louisiana, but he and the other petitioners whom he represented certainly intended to commit an offense in the south.

There was good reason why John should have wished to complete the transaction in Louisiana rather than in Mississippi. His wife's concern was making the purchase and was paying by check a brokerage fee, apparently regarded as legitimate. Throughout, John evinced a desire to keep the part of the transaction involving his wife's firm on a legitimate level, and it was natural that he would wish the legitimate transactions to take place in Louisiana rather than in Mississippi, where the liquor traffic was outlawed. (R. 383–384, 390.) That the Alcohol Tax Unit investigators may also have preferred to have the cash representing the illegal purchase price transferred in Louisiana, rather than in Mississippi, thus becomes immaterial.

4. Petitioners' objections to the procedure adopted by the trial judge in conducting a preliminary hearing to determine the proper scope of their cross-examination of John (Pet. 13, 32–34) are unjustified. At the outset of John's cross-examination, one of petitioners' counsel started asking John about his mother's business, a matter which certainly seemed to be irrelevant (R. 187–188). In the course of the discussion, which followed out of the presence of the jury, it became evident that petitioners' counsel intended to raise many collateral issues of doubtful propriety (R. 189–191, 196–198), and the trial judge stated that he wanted to "thrash it all out" before the jury was

brought back (R. 191). He then adopted the procedure of having John cross-examined outside the presence of the jury to determine what questions would be admissible (R. 202–203). In the course of that preliminary hearing, the judge frequently had occasion to limit or eliminate proposed questions (R. 205, 211, 215, 220, 221, 226, 229–230, 231, 237, 247–248, 251–252, 256, 258–260). Time and again the judge pointed out how the proposed cross-examination would lead into collateral issues not germane to the issues in the case (R. 220, 222, 237, 251–252, 256, 258). The court then made its ruling on the proper extent of cross-examination (R. 262–263).

Petitioners do not attack the propriety of the judge's final ruling, but contend merely that they were denied a fair trial because the jury was unable to hear John's first reactions to their questions. Since, however, so many of their questions were improper, it can hardly be said that the jury was deprived of opportunity to hear proper testimony. Furthermore, if petitioners' theory were correct, every preliminary hearing on the admissibility of a confession would deprive a defendant of a fair trial.

The proper scope of examination is a matter peculiarly within the discretion of the trial judge. *Glasser* v. *United States,* 315 U. S. 60, 83. The procedure he adopted to assure proper cross-examination was well within his authority as presid-

ing officer of the court. See *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, 95.

5. Petitioners also contend (Pet. 13, 35) that it was error to quash their subpoena directing the production of John's books relating to all his operations in Mississippi (see R. 372–382). The judge did allow petitioners to subpoena the books of the John's Beverage Company, the company to whom the liquor involved in this prosecution was sold, in order to enable them to establish that John was operating that company in his wife's name (R. 509, 513), but stated that he thought that the question of the amount of John's business in Mississippi, etc., would go into collateral matters that had no real bearing on credibility (R. 372–382). The ruling was in line with the judge's efforts on the cross-examination of John to keep collateral issues within reasonable bounds, and was clearly proper.

6. Petitioners' attack on the conduct of the trial judge (Pet. 13, 36–41) is so obviously without merit as hardly to require comment. The very references which petitioners give to alleged improper conduct (Pet. 36-37) show that the judge was doing no more than exercising his function to conduct the trial in an orderly manner and get the relevant facts before the jury. *United States* v. *Gross*, 103 F. 2d 11, 13 (C. C. A. 7); *United States* v. *Breen*, 96 F. 2d 782, 784

(C. C. A. 2), certiorari denied, 304 U. S. 585; *Hargrove* v. *United States,* 25 F. 2d 258, 259 (C. C. A. 8); *Kettenbach* v. *United States,* 202 Fed. 377, 385 (C. C. A. 9), certiorari denied, 229 U. S. 613. His questioning of witnesses was in fact very limited. His charge contained a full summary of the evidence on both sides (R. 1235–1245) and the passages which petitioners attack as prejudicial (Pet. 39–40) in themselves show balance and impartiality.

As to petitioners' contention that the judge failed to instruct the jury about the regulations governing sales to retailers (Pet. 37–38), it is clear from document that petitioners themselves had John sign (Gov. Ex. G–2, see Statement, *supra,* p. 6) that they were making the sale as one to a wholesaler. In any event, the price they charged was so clearly over the ceiling that it would make no difference whether the sale was to a wholesaler or a retailer.

As to the judge's refusal to give petitioners' requested charge that, since John was an informer, his testimony should be examined with greater care than the testimony of an ordinary witness (R. 1214, see Pet. 38–39), the simple answer is that such is not the rule in regard to informers. *Smith* v. *United States,* 17 F. 2d 723, 724 (C. C. A. 8), certiorari denied, 274 U. S. 762.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

T. VINCENT QUINN,
Assistant Attorney General.

ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

FEBRUARY 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948